

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUSTIN GARDNER,) 8:17CV338
)
 Plaintiff,) MEMORANDUM
) AND ORDER
 v.)
)
 STATE OF NEBRASKA,)
)
 Defendant.)
)

This matter is before the court on the Notice of Appeal filed by Plaintiff (Filing No. [31](#)). Also before the court are two memorandums from the Clerk of the Court requesting a ruling as to the timeliness of Plaintiff's notice of appeal and Plaintiff's authorization to proceed on appeal in forma pauperis (Filing No. [32](#); Filing No. [33](#)).

Pursuant to [Federal Rule of Appellate Procedure 4\(a\)\(1\)\(A\)](#), the notice of appeal in a civil case must be filed within 30 days of the entry of judgment. "A timely notice of appeal is both mandatory and jurisdictional." *Burgs v. Johnson Cnty.*, [79 F.3d 701, 702 \(8th Cir. 1996\)](#). Moreover, an untimely notice of appeal cannot serve as a motion for extension of time to file an appeal. *Id.* A district court may extend the time to file a notice of appeal if a party moves for an extension of time and shows excusable neglect or good cause, provided that the party moves for the extension of time within 30 days of the expiration of the 30-day period set out in Rule 4(a)(1)(A). [Fed. R. App. P. 4\(a\)\(5\)\(A\)](#). In addition, if a party files one of the post-judgment motions listed in Rule (a)(4)(A), the time to file the appeal runs from the entry of the order disposing of the motion. [Fed. R. App. P. 4\(a\)\(4\)\(A\)](#).

Here, the court entered a Memorandum and Order and a final Judgment dismissing Plaintiff's Complaint on March 5, 2018 (Filing No. [29](#); Filing No. [30](#).) Therefore, the final day for filing a timely notice of appeal was April 4, 2018. Plaintiff's Notice of Appeal is dated May 23, 2018, and stamped as filed on May 29, 2018 (Filing No. [31](#).) Because the Notice of Appeal is dated May 23, 2018, it could not have been deposited in the prison's mail system within the prescribed time. *See Fed. R. App. P. 4(c)(1)* (stating prisoner's notice of appeal is timely filed if deposited in the institution's internal mail system on or before the last day for filing). In addition, Plaintiff did not file any post-judgment motions that would extend the time

to file a notice of appeal. *See Fed. R. App. P. 4(a)(4)(A)*. Finally, Plaintiff did not move to extend the time to file a notice of appeal in this matter. *See Fed. R. App. P. 4(a)(5)(A)(ii)*. Accordingly, the court finds that Plaintiff did not file a timely notice of appeal and is not entitled to proceed on appeal in forma pauperis .

IT IS THEREFORE ORDERED that:

1. The court finds Plaintiff did not file a timely notice of appeal and is not entitled to proceed on appeal in forma pauperis.
2. The court will not act on Plaintiff's Notice of Appeal (Filing No. [31](#)).
3. The Clerk of the Court is directed to send a copy of Plaintiff's Notice of Appeal and a copy of this Memorandum and Order to the United States Court of Appeals for the Eighth Circuit.

DATED this 31st day of May, 2018.

BY THE COURT:

s/ Richard G. Kopf
Senior United States District Judge